

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2014 MSPB 5

Docket No. DE-0752-11-0343-B-1

**James Schnedar,
Appellant,**

v.

**Department of the Air Force,
Agency.**

January 16, 2014

James Schnedar, Albuquerque, New Mexico, pro se.

Basil R. Legg, Jr., Joint Base Andrews, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision on remand that sustained the agency's indefinite suspension action. For the reasons set forth below, we GRANT the appellant's petition and REVERSE the initial decision. The indefinite suspension is NOT SUSTAINED.

BACKGROUND

¶2 The appellant was formerly employed as an Information Technology (IT) Specialist. Initial Appeal File (IAF), Tab 11, Subtab 4a. As a condition of employment, he was required to obtain and maintain a security clearance, i.e.,

eligibility for access to classified information. *Id.*, Subtab 4d at 8. By memorandum dated December 8, 2009, the Air Force Central Adjudication Facility (AFCAF) notified the appellant of its intent to revoke his eligibility for access to classified information or assignment to a sensitive position. *Id.*, Subtab 4e. Along with the notice, AFCAF provided instructions for responding to the memorandum and a Statement of Reasons explaining the basis for the proposed revocation. *Id.* The appellant filed a timely response. IAF, Tab 12, Subtab 4f. In a letter of decision dated June 21, 2010, AFCAF notified the appellant of its final decision to revoke his eligibility for access to classified information or assignment to a sensitive position. IAF, Tab 12, Subtab 4g. The appellant was informed of his right to appeal the revocation either directly to the Personnel Security Appeals Board (PSAB) or by requesting a personal appearance before a Defense Office of Hearings and Appeals Administrative Judge. *Id.*

¶3 By notice dated October 20, 2010, the agency proposed to remove the appellant based on the revocation of his security clearance. IAF, Tab 12, Subtab 4i. In response, the appellant noted that he was in the process of appealing the revocation, with a hearing scheduled before an Administrative Judge. IAF, Tab 13, Subtab 4j. On March 16, 2011, the agency issued a decision mitigating the removal penalty to an indefinite suspension, beginning March 27, 2011, and ending upon either a favorable decision by PSAB or an unfavorable decision and any resulting administrative action. *Id.*, Subtab 4k. Unbeknownst to both parties, the PSAB had already upheld the revocation in a final decision dated March 10, 2011. *See* Remand Appeal File (RAF), Tab 6, Agency Ex. A. Neither party received a copy of the final PSAB decision until the following month, after the indefinite suspension had already gone into effect. *See id.*, Agency Ex. B; RAF, Tab 9 at 7-8.

¶4 The appellant filed a timely appeal of his indefinite suspension. IAF, Tabs 1, 6. On May 9, 2011, following its receipt of the PSAB decision, the agency again proposed the appellant's removal, and on June 3, 2011, the appellant

voluntarily resigned. RAF, Tab 6, Agency Ex. B; IAF, Tab 11, Subtab 4c. On January 3, 2012, the administrative judge issued an initial decision affirming the indefinite suspension. IAF, Tab 13.

¶5 On petition for review, the appellant asserted that the agency had violated Department of Defense (DoD) regulation 5200.2-R by taking administrative action against him prior to the final PSAB revocation decision. Petition for Review File (I-1), Tab 1. The Board found that the appellant's interpretation of the regulation was plausible and held that the Board had authority to determine whether the agency had complied with its own regulations in taking the indefinite suspension action. *Schnedar v. Department of the Air Force*, [119 M.S.P.R. 246](#), ¶¶ 5, 9 (2013). Accordingly, the Board remanded for a determination of whether the agency violated DoD 5200.2-R and, if so, whether the error was harmful. *Id.*, ¶ 11.

¶6 On remand, the administrative judge sustained the indefinite suspension, finding that chapter 8 of DoD 5200.2-R was inapplicable, and that, even if the agency had committed procedural error by suspending the appellant prior to his receipt of the PSAB decision, he was not harmed by the error. RAF, Tab 10, Remand Initial Decision (RID). This petition for review followed. Petition for Review File (B-1), Tab 1.

ANALYSIS

¶7 Generally, in an appeal of an adverse action based on the denial or revocation of a security clearance, the Board may only review: (1) whether the employee's position required a security clearance; (2) whether the clearance was denied or revoked; and (3) whether the employee was provided with the procedural protections specified in [5 U.S.C. § 7513](#). *Hesse v. Department of State*, [217 F.3d 1372](#), 1376 (Fed. Cir. 2000) (citing *Department of the Navy v.*

Egan, [484 U.S. 518](#), 530-31 (1988)).¹ Here, it is undisputed that the appellant's position required a security clearance in the form of eligibility for access to classified information, that his clearance was revoked, and that the agency provided the procedural protections required by statute.

¶8 However, section 7513 is not the only source of procedural protections for employees subject to adverse actions; agencies must also comply with the procedures set forth in their own regulations. *Romero v. Department of Defense*, [527 F.3d 1324](#), 1328 (Fed. Cir. 2008); *see Drumheller v. Department of the Army*, [49 F.3d 1566](#), 1569-72 (Fed. Cir. 1995). Under [5 U.S.C. § 7701\(c\)\(2\)\(A\)](#), the Board may not sustain an adverse action decision if the employee can show “harmful error in the application of the agency’s procedures in arriving at such decision.” Hence, as the Federal Circuit held in *Romero*, the Board may review whether the agency complied with its own procedures for revoking a security clearance. *Romero*, 527 F.3d at 1329. It follows a fortiori that the Board may also review whether the agency complied with its own procedures for taking an adverse action based on such revocation. *Schnedar*, [119 M.S.P.R. 246](#), ¶ 9.

¶9 Chapter 8 of DoD 5200.2-R, published in part at 32 C.F.R. part 154, subpart H, sets forth agency procedures relating to an “unfavorable administrative action,” including an adverse action² taken as a result of a personnel security determination. DoD 5200.2-R, C8.1.1, DL1.1.29 (located in the record at RAF, Tab 7); *see also* [32 C.F.R. §§ 154.3](#)(bb), 155(a). The regulation states that it “is

¹ In *Egan*, the Supreme Court stated that the Board may also review whether transfer to a nonsensitive position was feasible. *Egan*, 484 U.S. at 530-31. However, as the Federal Circuit clarified in *Griffin v. Defense Mapping Agency*, [864 F.2d 1579](#), 1580 (Fed. Cir. 1989), that inquiry is pertinent only where a statute or regulation provides the employee a substantive right to such reassignment.

² The term “adverse action” is defined to include the same actions listed under [5 U.S.C. § 7512](#), including a suspension of more than 14 days. DoD 5200.2-R, DL1.1.2; *see also* [32 C.F.R. § 154.3](#)(b).

intended only to provide guidance for the internal operation of the Department of Defense and is not intended to, does not, and may not be relied upon, to create or enlarge the jurisdiction or review authority of any court or administrative tribunal, including the Merit Systems Protection Board.” DoD 5200.2-R, C8.1.1; *see also* [32 C.F.R. § 154.55](#)(a). However, the Board’s authority to review whether the agency complied with its regulations derives from our preexisting obligation under [5 U.S.C. § 7701](#)(c)(2)(A), and does not stand in need of creation or enlargement. *See Romero*, 527 F.3d at 1328; *Schnedar*, [119 M.S.P.R. 246](#), ¶ 9. To the extent the regulation may purport to restrict that authority, we do not follow it, as the agency is without authority to so relieve the Board of its statutory obligations. *Cf. Aguzie v. Office of Personnel Management*, [116 M.S.P.R. 64](#), ¶ 20 (2011) (declining to follow Office of Personnel Management regulations purporting to exempt removals under 5 C.F.R. part 731 from adjudication under chapter 75 standards). Accordingly, we will consider whether the agency complied with chapter 8 of DoD 5200.2-R in reaching its decision to indefinitely suspend the appellant.

¶10 With exceptions not relevant here, section C8.2.2 provides that “no unfavorable administrative action shall be taken under the authority of this Regulation” unless the individual concerned has been afforded the procedures set forth in C8.2.2. *Id.*; *see also* [32 C.F.R. § 154.56](#)(b) (providing that no unfavorable administrative action will be taken under the authority of part 154 unless the person concerned has been given the procedures set forth under that paragraph). These procedural benefits include provision of a statement of the reasons for the unfavorable administrative action, the opportunity to respond to the Central Adjudication Facility (CAF), a written decision from the CAF, the opportunity to appeal to the relevant PSAB, and a written decision from the PSAB. DoD 5200.2-R, C8.2.2; *see Schnedar*, [119 M.S.P.R. 246](#), ¶ 5; *Rahgozar*

v. Department of the Air Force, [118 M.S.P.R. 37](#), ¶ 10 (2012).³ It follows that the agency may not take an adverse action pursuant to DoD 5200.2-R, including an indefinite suspension, if the employee concerned has filed an appeal with PSAB and is still awaiting a written decision on that appeal. While such an action would be consistent with the “efficiency of the service” standard under [5 U.S.C. § 7513](#), see *Jones v. Department of the Navy*, [978 F.2d 1223](#), 1226 (Fed. Cir. 1992), the agency must comply with its own regulations in addition to meeting statutory requirements.

¶11 On remand, the administrative judge accepted the agency’s argument that the provisions cited above were not intended to restrict indefinite suspensions taken under the authority of 5 U.S.C. chapter 75. See RID at 4. However, as we explained in the remand order, the agency’s argument is inconsistent with *Romero*, in which the court found that the agency had complied with [5 U.S.C. § 7513](#) but remanded the appeal for the Board to determine whether the agency had committed harmful error in the application of its own procedures. See *Romero*, 527 F.3d at 1328; *Schnedar*, [119 M.S.P.R. 246](#), ¶ 10. By its own terms, chapter 8 of DoD 5200.2-R covers any “adverse action which is taken as a result of a personnel security determination,” *id.*, C8.1, and the procedures set forth in that chapter therefore apply to the indefinite suspension on appeal.

¶12 The record shows that the agency did not comply with the requirements of DoD 5200.2-R, chapter 8. Although PSAB had already issued a final decision when the indefinite suspension was effected, the appellant had not yet received that decision, and thus had not been “[p]rovided a written decision by PSAB,” as required under C8.2.2.5. Because the appellant had not yet received all the procedural benefits guaranteed under C8.2.2, the indefinite suspension was taken

³ The procedures listed under [32 C.F.R. § 154.56](#)(b) include, inter alia, an “opportunity to appeal to a higher level of authority,” e.g., the PSAB, but the regulation does not explicitly refer to a written decision on appeal.

in violation of C8.1.1. The error was plainly harmful, for if the agency had complied with its regulations it would not have placed the appellant in a non-pay status on March 27, 2011, but would have awaited his receipt of the final decision from PSAB before taking any adverse action. *See Stephen v. Department of the Air Force*, [47 M.S.P.R. 672](#), 681, 685 (1991) (an agency error is harmful where the record shows that the procedural error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error); [5 C.F.R. § 1201.56](#)(c)(3). Consequently, the indefinite suspension cannot be sustained. *See* [5 U.S.C. § 7701](#)(c)(2)(A).

ORDER

¶13 We ORDER the agency to cancel the March 27, 2011 indefinite suspension action. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶14 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service Regulations, as appropriate, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶15 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181](#)(b).

¶16 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182](#)(a).

¶17 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶18 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See *Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, www.cafc.uscourts.gov.

Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.